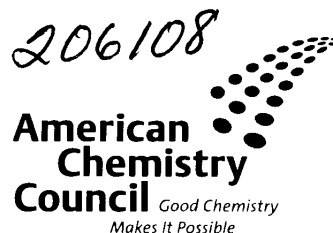


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August 26, 2002

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 715
Washington, D.C. 20036



Re: STB Finance Docket No. 33556, Canadian National Railway Company
– Control – Illinois Central Railroad Company, Petition of ATOFINA
Petrochemicals, Inc. and The Kansas City Southern Railway

Dear Mr. Williams:

The American Chemistry Council (“the Council”) represents the leading companies engaged in the business of chemistry, which is a \$455 billion enterprise and a key element of the nation’s economy. The business of chemistry is America’s #1 exporter, with \$80.2 billion in exports in 2001. Council members represent more than 90% of the productive capacity of basic industrial chemicals in the United States.

Although chemicals are transported by various modes, in many instances they must move by rail due to product characteristics, distance, customer preference, shipment size, and other factors. The business of chemistry therefore depends on railroads for the safe and efficient delivery of a wide array of raw materials and finished products. Each year, about 150 million tons of chemicals and allied products are shipped by rail, providing railroads with approximately \$5 billion in freight revenue. The Council’s members also invest directly in the nation’s rail infrastructure by maintaining their own tank car fleets (with an estimated replacement value of \$7 billion) and other specialized facilities and equipment.

Safety is of paramount concern to both the rail and chemical industries. Consistent and reliable service is also vital to the Council’s members, who must meet the needs of their customers in extremely competitive domestic, North American and overseas markets.

While not an active party in the merger of Canadian National Railway and Illinois Central Railroad (“CN/IC merger”), the Council follows with great interest all proceedings before the Surface Transportation Board (“Board”) that may have an effect on competition between or among railroads. The Council therefore offers its comments with regard to the joint petition by ATOFINA Petrochemicals, Inc. (“ATOFINA”) and the Kansas City Southern Railway (“KCS”) requesting that the Board interpret and enforce the “Geismar Condition” adopted by the Board in the CN/IC merger.



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The Geismar Condition required CN to modify haulage rights it had granted to KCS to serve three shippers at Geismar, Louisiana (BASF, Borden and Shell) under the CN/KCS "Access Agreement." The Access Agreement was ancillary to a joint CN/KCS marketing arrangement ("Alliance Agreement"). Both agreements were entered into in conjunction with the CN/IC merger. The Access Agreement allowed KCS to serve those three shippers, which had each provided support for KCS's then-pending proposed build-in to Geismar. In approving the merger of CN and IC, the Board concluded that the access granted KCS to serve "the three shippers that would have provided the preponderance of the traffic necessary to make the construction economically viable [make it] improbable that KCS will pursue, or that we would approve, this [Geismar line] construction project." *CN/IC*, Decision No. 37 at 33. The Board therefore found that the CN/IC merger had an adverse impact on competition at Geismar and conditioned the merger on extending the Access Agreement to include Rubicon, Uniroyal and Vulcan, which were located near the proposed build-in line.

While Geismar is important to the Council as one of the major industrial corridors for the production of petrochemicals, of overriding interest are the principles at issue in this proceeding:

- The first principle is that competitive rail service should not be lost as a result of, or in conjunction with, a railroad merger. The Board recognized this principle in the CN/IC merger when it held that the marketing alliance involving CN and KCS and the related Access Agreement were merger-related and would result in the termination of the KCS proposal to build-in to the Geismar area.
- The second principle involved in this proceeding is that new rail line construction provides opportunities not only for the parties sponsoring or supporting that construction, but also for other parties along the proposed route or who otherwise could be served by the new line. This principle was recognized in the Board's CN/IC decision, which expanded the CN/KCS Access Agreement to apply to other parties in the immediate vicinity of the proposed KCS line construction.
- The third principle is that since railroad mergers and any related competitive losses last forever, the remedial conditions imposed by the Board should be interpreted broadly to apply to any and all parties adversely affected by the competitive loss. This last issue is raised specifically in the ATOFINA/KCS petition.

The passage of time does not cure competitive loss, and should not foreclose competitive opportunity. As reflected in the pleadings of the parties pending before the Board, KCS had indicated to shippers other than the three which supported the build-in that it would address service to them following authorization of the Geismar build-in. Had the line been authorized and constructed, service could have been extended to other parties at any time in the future, whether soon thereafter or years later.

Loss of competitive opportunity, while personal to those involved, more broadly affects the districts or regions where that loss occurs. This is reflected in the merger provisions of the

ICC Termination Act, which require the Board to consider (among other factors) "whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region . . ." 49 U.S.C. §11324(b)(5). As described above, the Board concluded that the CN/IC merger had an impact on competition at Geismar, and imposed a remedial condition to protect those between or adjacent to properties proposed to be served by the KCS build-in line. There is no statutory or other reason why others similarly situated – whether then in the area proposed to be served by KCS, or who later may purchase property and construct a new facility in that area, or who subsequently determine to construct a rail line or a transload so they may deliver their traffic to the impacted area – should not be treated in the same fashion. Indeed, the Access Agreement specifically provided that KCS may serve new production facilities which in the future may be constructed and "operated on the properties owned by Shell, Borden and BASF at Geismar . . ." See Exhibit B to ATOFINA/KCS Petition at ¶C.

As noted by CN in its Reply to ATOFINA and KCS, ATOFINA's predecessor, Fina Oil and Chemical Company, did not actively participate in the CN/IC merger. However, there are many reasons why companies do not participate in merger proceedings before the Board yet later may seek remedial relief. These include change of management, change of operational structure impacting utilization of rail service, plant expansions elevating the importance of rail service, and a change in the Board's policies. The latter bears special mention here because it appears to the Council that the Board did change its policy.

The Geismar Condition served to remedy a loss of competitive opportunity, which would have been available through industry connectors or build-outs to a build-in initiative, which was lost due to the CN/IC merger and the related Access Agreement. Commendably, in the CN/IC merger the Board reversed an earlier position on remedying the loss of competition provided by build-outs to build-in lines reflected in its decision on the UP/SP merger. There, the Board had declined to impose a condition protecting Enterprise Products Company ("Enterprise") from its loss of competitive service anticipated through a build-out to the build-in proposed by UP to the petrochemical complexes at Mont Belvieu, Texas, served by SP. The merger of UP and SP had rendered that build-in moot. However, unlike its recognition that the loss of economic justification for the Geismar line would render the KCS build-in moot and thus cause a competitive loss, the Board had found that Enterprise's remedy would be to construct the 10+ mile rail line originally contemplated by UP. *UP/SP*, Decision No. 44 at 189 and Decision No. 68. The logic and public policy reasons underlying the Geismar Condition apply equally to ATOFINA as well as to any other parties at Geismar who may be similarly situated. The loss of competitive opportunity is no less permanent for ATOFINA than it was for Rubicon, Uniroyal and Vulcan. The failure of the Board to interpret its Geismar Condition as applying broadly to Geismar itself, as requested by ATOFINA and KCS (which have not sought to broaden the condition geographically), would make the competitive loss permanent.

In summary, the Council urges the Board to recognize that competitive losses in rail merger proceedings have broad geographic effects, and that remedial conditions are imposed to protect against loss to the region, and not solely for the benefit of individual shippers. The Council appreciates the Board's consideration of the views of the business of chemistry, and

trusts that the Board will continue its policies with regard to the protection against loss of competition in rail merger proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T. E. Schick", written in a cursive style.

Thomas E. Schick, Counsel

cc: The Honorable Linda J. Morgan, Chairman
The Honorable Wayne O. Burkes, Vice Chairman
Martin W. Bercovici, Esq.
William A. Mullins, Esq.
Paul A. Cunningham, Esq.
Nicholas J. DiMichael, Esq.